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No. 08-430

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

MICHAEL EMERSON CORRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Capital Case

Question Presented for Review

In this pre-AEDPA capital appeal, the court of appeals remanded this case for an evidentiary hearing on Respondent Michael Emerson Correll's claim pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel was ineffective at sentencing. Following the hearing, the district court denied Correll's claim. On appeal from that decision, the court concluded that Correll had received ineffective assistance of counsel at sentencing and that he was prejudiced as a result.

The court of appeals applied the clear-error standard in reviewing the decision of the district court. In conducting a thorough review of the evidence and record developed in the district court, the court of appeals provided a precise basis for its ruling and detailed those portions of the record where the district court made erroneous findings of fact.

1. Whether the court of appeals properly applied the standard set forth in *Strickland* in this fact-based case when it concluded that Correll's trial counsel provided ineffective assistance at sentencing by failing to investigate and present readily available evidence in mitigation of Correll's crime.

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Respondent, Michael Emerson Correll, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion by the Ninth Circuit. The opinion of the court of appeals is reported at *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008).

Statement of the Case

Correll respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the opinion below.[1]

Correll notes that his federal habeas corpus petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and accordingly, the provisions of that act do not apply to him. Apx. A-34 to A-35. *See Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997).

Reasons for Denying the Petition

1. The court of appeals correctly applied the clear-error standard in its review of the district court's findings.

This case is about ineffective assistance of counsel in a capital sentencing proceeding. In 1998, the court of appeals remanded this case for an evidentiary hearing

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1. Petitioner filed as Appendix A to her petition for writ of certiorari a copy of the opinion below. Reference to the opinion below in this brief will be to Appendix A and will be noted as "Apx. A-__." The district court opinion was included as Appendix B and will be noted as "Apx. B-__." Petitioner did not append the state supreme court's direct-review opinion to her petition.

on that specific question, *see Correll v. Stewart*, 137 F.3d 1404, 1420 (9th Cir. 1998), and the district court's conclusion that Correll was not entitled to relief was the sole issue before the court of appeals below. *See* Apx. A-34. After the remand in this pre-AEDPA, fact-driven capital case, the court of appeals reversed due to the erroneous conclusions of the district court, and found Correll's trial counsel failed to properly investigate and present readily available mitigation evidence during the capital sentencing proceedings, and further determined Correll was prejudiced by that failure.

Petitioner does not present a compelling reason for this Court to grant certiorari. Petitioner's question is not of national importance, does not cite to a circuit conflict, and does not demonstrate that the opinion below is in conflict with this Court's precedent. *See* Sup. Ct. R. 10. Petitioner is simply asking this Court to correct factual findings she perceives as erroneous. By arguing that the court of appeals failed to defer to the district court, Petitioner overlooks the likelihood that the court of appeals correctly applied the clear-error standard and reached a conclusion different from that of the district court. That is what happened in this case. In each instance where the court of appeals disagreed with the district court's finding of fact, it said so and explained in detail with citations to the record as to the reasons why the findings were clearly erroneous.

a. An appellate court will uphold a trial court's findings of fact unless those findings are "clearly erroneous." Fed. R. Civ. P. 52(a)(6). A "clearly erroneous" finding is one that "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When an appellate court has conducted a thorough review of the evidence and concluded that the trial court's findings were clearly erroneous, the appellate court must provide a "precise basis" for that conclusion. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 n.20 (1984) ("If the Court of Appeals disagreed with the District Court's factual findings, it should not have dismissed them without finding them clearly erroneous.").

Here, the court of appeals conducted its constitutionally mandated review of Correll's conviction and sentence, and did so with the proper regard for Rule 52(a)(6). The court reviewed the "entire evidence," *U.S. Gypsum Co.*, 333 U.S. at 395, and, as described below, detailed those portions of the record where the district court made clearly erroneous findings of fact. The use of evidence by the court of appeals in its review of the district court's findings of fact, and its discussion of "clear error," stands in contrast to the approach taken by the court of appeals in *Inwood Labs. See* 456 U.S. at 857 n.17 ("The Court of Appeals cited no evidence to support its conclusion . . . ."); *see also id.* at 853 (reversing after noting that court of appeals reached its ruling "[w]ithout expressly stating that the District Court's findings were clearly erroneous . . . .").

The court of appeals conducted a comprehensive review, "meticulously review[ing] the entire record and reach[ing] the conclusion that the District Court was in error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 581 (1985) (Powell, J., concurring in judgment only); *see also* Apx. A-63 to A-68. And in its review, the court relied on "documents or objective evidence," *Anderson*, 470 U.S. at 575, to assist in the evaluation of the district court's findings. *See, e.g.*, Apx. A-37 to A-39 (relying on, *inter alia*, counsel's handwritten notes and testimony to reject as "clearly erroneous" the district court's finding that Correll's attorney maintained "regular contact with [Correll] prior to sentencing"); Apx. A-39 to A-42 (drawing on counsel's testimony during the mitigation hearing to reject as "clearly erroneous" the district court's implicit finding that counsel was unaware of certain mitigating evidence). In accordance with this Court's instructions on how to apply Rule 52(a)(6), the court of appeals concluded, based upon its consideration of the record, that the district court's findings were "clearly erroneous." The court of appeals correctly applied the standard articulated in Rule 52(a) and, therefore, certiorari should not be granted.

b. The court of appeals relied upon *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny in reaching its decision. Citing *Strickland*; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000), throughout its opinion, the court of appeals concluded Correll did not receive effective assistance of counsel at sentencing.

Specifically, the court of appeals concluded that trial counsel's mitigation investigation was "unreasonably limited" and his performance was "constitutionally deficient." Apx. A-44, A-45. The mitigation evidence that counsel did present—a short written response to a presentence report—was "constitutionally deficient," "anemic," and failed to defend against the State's aggravating evidence. Apx. A-46 to A-50. "[D]efense counsel put on no affirmative penalty defense whatsoever. He did not call a single witness to testify. He did not introduce any evidence." Apx. A-46. In this case, "there was a substantial amount of mitigating evidence that could have been presented, but was not." Apx. A-59. In view of the record developed in this case—"an unusual case in the capital context because it involved a defendant who had not killed any of the victims"—"there is a significant possibility that the introduction of *some* mitigating evidence could have spared Correll's life." Apx. A-68.

In *Strickland*, this Court established the standard for addressing claims of ineffective assistance of counsel at capital trials and for determining whether any such deficient performance was prejudicial to the defendant. This Court has repeatedly reviewed and reaffirmed the analytic process set forth in *Strickland*. *See Rompilla*, 545 U.S. at 393-94 (O'Connor, J., concurring) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*.") (citation omitted); *Wiggins*, 539 U.S. at 521-23 (reiterating that *Strickland* is the metric by which claims of ineffective assistance of counsel are

judged); *Williams*, 529 U.S. at 391-94 (discussing the *Strickland* analysis in detail). This was the analysis applied by the court of appeals.

c. Petitioner claims that the court below did not afford deference to the district court's factual findings. Pet. at 6-7. Petitioner's complaint is that the opinion by the court of appeals is not supported by, or is contrary to, or presents an entirely different perspective of, the facts than the district court's findings. Petitioner seems to say that an appellate court is confined to reviewing the four corners of the district court opinion, rather than the entire district court record. That is not the case, however, as the factual findings by the district court must be fairly supported by the record as a whole. *See U.S. Gypsum Co.*, 333 U.S. at 395. Here they were not.

i. The performance by Correll's trial counsel did not even approach the standard set by *Strickland* and its progeny for counsel in a capital sentencing proceeding. Petitioner takes issue with the specific language used by the court of appeals when it found that the district court erred in denying relief. These complaints have no merit.

The court of appeals agreed with the district court that trial counsel's failure to obtain Correll's psychiatric records constituted deficient performance. Apx. A-44. However, in reviewing other aspects of trial counsel's performance, the court of appeals determined that the district court was clearly erroneous in making its findings.

For instance, trial counsel did little to discuss potential mitigation evidence with Correll. The district court found that trial counsel maintained regular contact, meeting with Correll prior to sentencing. Apx. B-18. However, counsel's testimony and his handwritten notes demonstrate that counsel met with Correll at the most three times, and perhaps only once, and that counsel made minimal efforts to explain mitigation to Correll. Based on this record, the court of appeals "conclude[d] that the district court's factual finding on this issue was clearly erroneous and that the district court's legal conclusion was in error." Apx. A-38 to A-39.

The district court also excused trial counsel's failure to inquire as to Correll's social background, family abuse, mental impairments, physical health, and substance-abuse history because Correll "had not informed" his lawyer about these factors. Because of this failure, the district court continued, trial counsel was unaware of and could not have investigated these mitigating factors. Apx. A-39 to A-40. But when he testified at the evidentiary hearing, trial counsel "explicitly confirmed that he was aware of Correll's mental health disorders, psychiatric commitments, drug abuse history, brain injury, and family dysfunction." Apx. A-40. Based on this record, the court of appeals concluded that "trial counsel was aware of many if not all relevant mitigating factors" and the district court's findings were "clearly erroneous." Apx. A-42.

Armed with the knowledge of Correll's background, trial counsel nevertheless failed to ask witnesses he interviewed about this potential mitigation. The district

court concluded that the witnesses who counsel interviewed "were not able to provide relevant useful mitigation information."[2] Apx. B-19. However, trial counsel admitted he only interviewed witnesses for the guilt phase and not the sentencing phase, and that he did not conduct an investigation as to any of the mitigation evidence of which he was aware. Apx. A-42 to A-43. He expressly testified that he did not question "interviewees about Correll's drug abuse, head injury, psychiatric history, or family dysfunction. . . ." Apx. A-43. Instead, counsel asked witnesses to tell him things that the witnesses thought might help. Apx. A-43.

Finding the district court's conclusions clearly erroneous, the court of appeals determined counsel's failure did not result from the unavailability of mitigation, but from "counsel's complete failure to ask any relevant questions" of the witnesses. Apx. A-43. Trial counsel testified that he wanted to "show Correll as a 'good person' and one who had 'done good deeds.'" Apx. A-44. This, the court of appeals concluded, was unreasonable because it would not likely humanize Correll, as counsel was aware of evidence that "would portray Correll as a 'person whose moral sense was warped by abuse, drugs, [or] mental incapacity.'" Apx. A-45 (alteration in original). Even if this was counsel's strategy, his investigation was inadequate as counsel failed to contact witnesses who were available

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2. At least twenty-four of the witnesses were law-enforcement officials. Trial counsel "testified that he met only once with Correll's father, sister, and brother, 'around the kitchen table at the same time,' and probably spent only '[a] couple hours' with them." Apx. A-42 (alteration in original).

to testify on Correll's behalf. Apx. A-45. Based on all this, the court of appeals concluded counsel's failure to investigate for sentencing was constitutionally inadequate and fell "far short of any objective standard against which we might measure reasonable attorney performance under the Sixth Amendment." Apx. A-46.

The court of appeals also determined that "[a]s anemic as the defense counsel's investigation was, his presentation of mitigating evidence at the penalty phase was worse." Apx. A-46. The record showed that counsel "did not call a single witness to testify[] [and] [h]e did not introduce any evidence." Apx. A-46. This was a "critical error, certainly rising to the level of constitutionally deficient representation" because "[a]t the time of the penalty phase proceedings, Arizona law mandated the death penalty if the trial judge found any one of the enumerated aggravating factors and determined that there were no mitigating factors that were sufficiently substantial to call for leniency." Apx. A-48 to A-49 (citation omitted). Under Arizona law, "[o]ne of the enumerated aggravating circumstances is a previous violent felony, for which Correll unquestionably qualified." Apx. A-49.

ii. This Court has consistently held that trial counsel's failure to present readily available evidence of mitigation is sufficient to undermine confidence in the result of a sentencing proceeding, thereby rendering counsel's performance prejudicial. *Rompilla*, 545 U.S. at 390-91. A sentencing proceeding infected by constitutionally deficient investigation and presentation of mitigation establishes prejudice whenever the reviewing court cannot have "confidence in the

outcome" of such a proceeding. *Strickland*, 466 U.S. at 694. This Court has emphasized that the prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[T]he [outcome-determinative] standard is not quite appropriate." *Id.* Rather, Correll must show a "reasonable probability" that counsel's errors are of a magnitude "sufficient to undermine confidence in the outcome of the proceeding." *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

In this case, counsel operated under a misconception of mitigation that was so fundamentally flawed as to approach hostility to the idea. For instance, at the evidentiary hearing, he referred to the sentencing hearing as "a dog and pony show" and "so much smoke." Apx. A-55. Trial counsel believed that the trial judge would not have been receptive to mitigation evidence that was "touchy-feelly [sic] fuzzy-headed kind of stuff." Apx. A-55 (alteration in original). When asked about Correll's brain injury, his history of drug addiction, and abuse suffered as a child, "counsel testified that he didn't think of the evidence as favorable evidence." Apx. A-55. The district court ignored this testimony.

Counsel failed to investigate and present evidence of Correll's brain injury,[3] alcohol and drug use both

3. The court of appeals determined that the district court erred when it concluded Correll presented insufficient evidence of organic brain damage. It was not the district court's role to (Cont'd)

before[4] and at the time of the murder,[5] psychiatric

(Cont'd)
"evaluate the evidence in order to reach a conclusive opinion as to Correll's brain injury. . . ." Instead, "[t]he district court should have decided only whether there existed a 'reasonable probability' that 'an objective fact-finder' in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes." Apx. A-60 n.6 (citation omitted).

4. There was significant evidence in the record from prison records, medical records, and witnesses to corroborate Correll's history of drug abuse. The district court, however, discounted Correll's substance-abuse history because it was based on self-reports. The court of appeals held this finding was clearly erroneous, because the district court ignored corroborating evidence in the record. Apx. A-63 n.7.

5. The district court relied on testimony from the trial that Correll did not appear to be intoxicated at the time of the crime. However, experts testified at the evidentiary hearing that "gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers." Apx. A-65. Based on Correll's habitual use of methamphetamine in an extremely high dosage, the experts concluded Correll was in a "methamphetamine blackout," explained as the user being "capable of performing complex tasks but would be incapable of understanding or remembering his behavior. One of the experts, a recovered methamphetamine addict, specifically confirmed the possibility that 'those observing a person in a methamphetamine blackout [wouldn't] know that the person is in a methamphetamine blackout.'" Apx. A-65 to A-66 (alteration in original). Again, the district court ignored this testimony.

(Cont'd)

impairments,[6] and commitments to institutions.[7] The court of appeals relied upon this Court's holding in *Wiggins* to conclude that the available evidence presented classic mitigation evidence and that there was a reasonable probability that an objective fact-finder would have reached a different conclusion. Apx. A-63 to A-64 (citing 539 U.S. at 534-38).

d. Because none of the evidence described above was properly presented to the court at sentencing, prejudice is established and confidence in the result is undermined. The court of appeals relied on this Court's well established opinions in *Strickland* and its progeny,

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(Cont'd)
This undermined the court's finding, and it was "clearly wrong to conclude that there was no available evidence that Correll was grossly intoxicated" on the night of the crime. Apx. A-66.

6. "Correll was committed to psychiatric institutions at least twice during his teen years and was described at age 16 as 'severely psychologically impaired.' He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and he attempted suicide on two occasions." Apx. A-61 to A-62.

7. "Correll became a ward of the state at age 14 and spent his teenage years in various state institutions described as 'gladiator schools,' which were characterized as cruel and inhumane, even by those who worked there. He was placed in programs for low performing students, which were referenced as 'dummy shacks.'"

Apx. A-61.

as well as Sixth Amendment standards in reaching this result. And as discussed herein and at length in the opinion below, the findings are supported by both the facts and the law. Contrary to the protestations of Petitioner, the court of appeals did apply the clear-error standard in reviewing the factual findings of the district court, and it applied the standard properly. The fact that Petitioner disagrees with the opinion of the court of appeals should not compel this Court to grant certiorari.

2. The court of appeals conducted the appropriate prejudice-prong review as part of its *Strickland* analysis.

a. Petitioner suggests that the court of appeals eliminated the prejudice prong of *Strickland* and presumed prejudice. Pet. at 20. Petitioner quotes a section from the opinion below where the court notes that "there was a substantial amount of mitigating evidence available, which taken together, is sufficient to raise a presumption of prejudice under . . . *Wiggins*." Apx. A-63 (footnote and citation omitted). However, in the next sentence the court says "[b]ut we need not rest on presumption." Apx. A-63. The court then continued at length, much of which has been described above, and relying upon this Court's holding in *Wiggins*, concluded that the available evidence was classic mitigation, and "[i]n view of the record developed at the evidentiary hearing, [] conclude[d] that there is a reasonable probability that the outcome of Correll's sentencing would have been different had he received competent representation." Apx. A-68.

Again, Petitioner does not present a compelling reason for this Court to grant certiorari. Petitioner ignores the fact that the court of appeals performed the prejudice analysis required by *Strickland*. Apx. A-63-68. Petitioner seems to manufacture this question in order to ask the Court to review this fact-bound case. Here, the court of appeals correctly applied *Strickland* and decided the case on the merits. The opinion of the court of appeals does not present a question of national importance, does not create a circuit split, and is not in conflict with this Court's precedent. Sup. Ct. R.10.

b. This case is not the appropriate vehicle for determining, as Petitioner suggests, whether the Arizona courts correctly apply a causal-nexus test to evidence presented in mitigation of a capital crime, or whether the Arizona Supreme Court and the court of appeals are in conflict over application of a causal-nexus test. Pet. at 24-25. This case has a complex and convoluted procedural history and factual record, and is distinguishable from the state court cases cited by Petitioner. It is not a case in which certiorari should be granted.

Here, the causal-nexus issue arose for the first time in the federal district court during habeas corpus proceedings. The district court judge presided over an evidentiary hearing and improperly substituted his own judgment regarding the evidence for that of a reasonable juror in a state capital-sentencing proceeding, and also improperly limited his consideration of such evidence to that causally connected to the crime.

In finding no prejudice from counsel's deficiencies, the district court believed Correll was required to show a "causal nexus" between the proffered mitigation and the crime in order to support leniency. Apx. B- 75 n.47, B-80, B-94. This Court has made clear that this "causal nexus" requirement is unconstitutional, and flies in the face of years of death penalty jurisprudence. *See Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam); *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004). The court of appeals did not require Correll to show a "causal nexus" before finding the evidence mitigating, correcting the district court's error.

The Arizona Supreme Court has not been fairly presented with the causal-nexus issue in this case, which did not even arise in state court, and the state supreme court has not yet been given the opportunity to address *Tennard* and *Smith* in this matter. This is not a case in which a jury was prevented from considering evidence presented in a capital sentencing proceeding; it is thus entirely distinguishable from the Arizona Supreme Court's causal-nexus jurisprudence in that regard.

c. Petitioner complains that the court of appeals did not consider rebuttal evidence the State would have presented if trial counsel presented the mitigation evidence previously described herein. Pet. at 25-29. Again, Petitioner ignores the opinion by the court below.

The court of appeals determined "*all* the so-called 'damaging rebuttal evidence' could, in the hands of a competent attorney, have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder." Apx. A-67. The court noted "[t]hat

some of the defense witnesses at sentencing might have presented inculpatory testimony is not particularly significant, given that counsel had abandoned at sentencing any claims of actual innocence or misidentification." Apx. A-67 n.9. The court of appeals, in considering these facts, observed, "Indeed, all of the facts on which the dissent relies could be either dehumanizing or mitigating, depending on the context and history given for each cited fact." Apx. A-67 (footnote omitted). The court then concluded that "[i]n view of the record developed at the evidentiary hearing, . . . there is a reasonable probability that the outcome of Correll's sentencing would have been different had he received competent representation." Apx. A-68.

Additional support for the court's conclusion was the fact that the crime "involved a defendant who had not killed any of the victims. . . ." Apx. A-68. And, "[t]he failure to present a mitigation case was particularly indefensible under Arizona law that existed at the time, which required the imposition of the death penalty absent a case in mitigation." Apx. A-68. Considering all of these factors, the court of appeals determined, "there is a significant possibility that the introduction of *some* mitigating evidence could have spared Correll's life." Apx. A-68. Again, because of the fact-specific nature of the decision below, there is nothing about the relief granted that should compel this Court to grant review.

Conclusion

For these reasons, this Court should deny the petition for a writ of certiorari.

December 3, 2008

Respectfully submitted,

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